

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DUSTIN BENNETT</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 255,335 <sup>1</sup>
<b>SCOTT MASONRY, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>TIG INSURANCE</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appealed the August 9, 2007, Order entered by Administrative Law Judge Brad E. Avery. The Board placed this appeal on its summary docket for disposition without oral argument. The parties, however, submitted briefs to the Board setting forth their arguments. Frank D. Taff of Topeka, Kansas, submitted a brief on behalf of claimant. And Kevin J. Kruse of Overland Park, Kansas, submitted briefs on behalf of respondent and its insurance carrier (respondent).

**ISSUES**

This is a post-award matter. The only issue is whether claimant should be awarded attorney fees for the work that his attorney performed in filing an application for additional medical treatment. In the August 9, 2007, Order, Judge Avery awarded claimant attorney fees in the sum of \$637.50.

Respondent contends Judge Avery erred. Respondent argues it should not be required to pay claimant attorney fees as he did not request additional medical benefits before applying for and requesting a hearing, such being unnecessary as respondent agreed to claimant's request in a timely fashion. In addition, respondent argues it is against public policy to assess attorney fees against them as they have complied with claimant's award of permanent disability benefits and, besides, the services claimant's

---

<sup>1</sup> The docket number shown on the August 9, 2007, Order, Docket No. 255,355, is a clerical error. The correct docket number is Docket No. 255,335.

attorney performed were purely ministerial. Accordingly, respondent requests the Board to reverse the August 9, 2007, Order.

Conversely, claimant contends the August 9, 2007, Order should be affirmed. Claimant, in essence, argues the Workers Compensation Act does not require him to either send some type of “notice of intent” or otherwise request additional medical benefits before filing a post-award request for additional medical benefits. Also, claimant’s attorney argues he initially had to retrieve and review the file “to insure that [claimant’s] rights were properly asserted and protected.”<sup>2</sup> Claimant further asserts it is proper to apply for and request a hearing without first otherwise requesting benefits as it is generally more expedient. Claimant argues respondent’s attorney did not know who the ultimate insurance entity was in this claim or whether he would be hired to represent it.<sup>3</sup> In addition to the fees awarded by Judge Avery, claimant also requests additional fees for the time expended on this appeal.

As claimant’s request for additional fees should be first presented to the Administrative Law Judge, the only issue before the Board on this appeal is whether claimant is entitled to attorney fees for the services his attorney rendered in helping claimant obtain post-award medical benefits.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to address claimant’s request for post-award medical benefits and considering the parties’ arguments, the Board concludes the August 9, 2007, Order should be affirmed.

The facts are not in dispute. By an Award dated April 26, 2002, and a Nunc Pro Tunc Award dated May 1, 2002, claimant was awarded permanent disability benefits for a March 8, 2000, accident and resulting right lower extremity injury. The Award and Nunc Pro Tunc Award also provided that claimant could receive additional medical benefits upon proper application to the Director of the Division of Workers Compensation.

On June 4, 2007, claimant filed an application requesting additional medical care. But before the hearing on that application was held, respondent agreed to refer claimant to an orthopedic specialist.

---

<sup>2</sup> Claimant’s Brief at 3 (filed Sept. 11, 2007).

<sup>3</sup> *Id.* at 4.

Respondent argues claimant should have requested additional medical benefits from it before he applied for and requested a hearing. The gist of respondent's argument is that the proceedings were unnecessary and it is against public policy to assess attorney fees against an employer or its insurance carrier who are complying with the terms of an award.

The Board notes it is speculation whether claimant would have obtained the same results in the same amount of time had he merely telephoned or written respondent's counsel to request additional medical treatment without requesting a hearing to address the request. Knowing there is a deadline, which is created by the hearing date, provides incentive for parties to act in a timely manner.

Regardless, the Board sees the issue concerning claimant's attorney fees as being two-pronged. The first question is whether a worker must request additional medical benefits from an employer and its insurance carrier before applying for and requesting a hearing on the issue. And the second question is whether attorney fees should be granted for the preliminary or preparatory services an attorney renders in determining the propriety of the request, gathering and reviewing the pertinent medical records, making the request for treatment, and setting the matter for hearing.

The first question is easily answered as the Workers Compensation Act contains no such requirement. Post-award requests for medical treatment are governed by K.S.A. 2006 Supp. 44-510k, which provides:

(a) At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

(b) Any application for hearing made pursuant to this section shall receive priority setting by the administrative law judge, only superseded by preliminary hearings pursuant to K.S.A. 44-534a and amendments thereto. The parties shall meet and confer prior to the hearing pursuant to this section, but a prehearing settlement conference shall not be necessary. The administrative law judge shall

have authority to award medical treatment relating back to the entry of the underlying award, but in no event shall such medical treatment relate back more than six months following the filing of such application for post-award medical treatment. Reviews taken under this section shall receive priority settings before the board, only superseded by reviews for preliminary hearings. A decision shall be rendered by the board within 30 days from the time the review hereunder is submitted.

(c) The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

The Act requires the parties to meet and confer before the hearing for post-award medical benefits. But the Act does not require workers to first notify or otherwise make some sort of informal request of an employer or its insurance carrier before applying for or scheduling a post-award hearing for medical benefits. Accordingly, claimant's attorney did not violate any provision of the Act by requesting and scheduling a hearing before first contacting respondent or its counsel.

K.S.A. 2006 Supp. 44-510k(c) provides that the administrative law judge *may* award fees and costs on the worker's behalf consistent with K.S.A. 44-536(g), which provides:

In the event any **attorney renders services to an employee** or the employee's dependents, **subsequent to the ultimate disposition of the initial and original claim**, and in connection with an application for review and modification, **a hearing for additional medical benefits**, an application for penalties or otherwise, **such attorney shall be entitled to reasonable attorney fees for such services**, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent. (Emphasis added.)

The above-quoted statute does not differentiate between services rendered before, during, or after a hearing. The Board concludes the statute, however, provides attorneys should be compensated for the preliminary and preparatory work required to determine whether a worker has a legitimate claim for post-award medical benefits, gather the evidence to support such request, formulate a strategy and advance the request through hearing, if needed. Legal counsel is important during this preliminary phase as the worker must be prepared to prove the necessity and reasonableness of the requested medical treatment and, perhaps, its relationship to the original compensable injury. Moreover, workers must exercise caution in their requests as the Act punishes individuals for claiming benefits without a basis in fact or law.<sup>4</sup>

Respondent cites the *May*<sup>5</sup> decision for the proposition that it is against public policy to assess attorney fees against an employer or its insurance carrier when they have complied with the terms of an award. That is an accurate statement of law but it must be considered in context. In *May*, the issue before the Kansas Court of Appeals involved fees for merely clerical or ministerial services as opposed to fees for actual legal services. Consequently, the facts in *May* are distinguishable and, therefore, that decision is not pertinent to this appeal.

Judge Avery determined claimant was entitled to receive attorney fees in this instance and the Board agrees. The Board notes respondent does not challenge the itemized statement that claimant presented at the August 9, 2007, hearing or the amount of fees that the Judge granted. Therefore, the amount of attorney fees is not an issue before the Board.

Based upon the above, the August 9, 2007, Order should be affirmed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>6</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**WHEREFORE**, the Board affirms the August 9, 2007, Order entered by Judge Avery.

**IT IS SO ORDERED.**

---

<sup>4</sup> K.S.A. 44-5,120(d)(5).

<sup>5</sup> *May v. University of Kansas*, 25 Kan. App. 2d 66, 957 P.2d 1117 (1998).

<sup>6</sup> K.S.A. 2006 Supp. 44-555c(k).

Dated this \_\_\_\_ day of November 2007.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant  
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge